

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 9 OF 2004

Mr. Edultacao Karidade Britto,
resident of Ashvem, Mandrem,
Goa.

... Appellant

versus

1. Shri Jose D'Souza

2. Shri Babtiz Britto

3. Shri Sebastiao D'Souza,
all residents of Ashvem,
Mandrem, Pernem, Goa.

4. State, through Public Prosecutor.

... Respondents

Mr. V. R. Tamba, Advocate for the Appellant.

Mr. D. V. Patkar, Advocate for Respondent Nos. 1 to 3.

Mr. S. N. Sardessai, Public Prosecutor for the State.

CORAM : V. M. KANADE, J.

DATE : 22ND JUNE, 2005.

ORAL JUDGMENT

The Appellant is the Original Complainant. He is challenging the Judgment and Order passed by the Judicial Magistrate, First, Class, Pernem, in

Private Criminal Case No. 30/P/2001 whereby the trial Court was pleased to acquit the Accused of the offences under Sections 427, 447, 379 r/w Section 34 of the Indian Penal Code.

2. The brief facts which are relevant for deciding this Criminal Appeal are as under:-

The Appellant is the owner of property bearing Survey No. 224/0 of Village Mandrem in which there are various trees such as banyan tree, bhendi, cashew trees etc. There is a Chapel of Santa Cruz which is next to the property owned by the Appellant. Some of the villagers felt that the branches of some of the trees from the said property owned by the Appellant were likely to endanger the Chapel of Santa Cruz which was next to the property owned by the Appellant. They had, therefore, filed a complaint before the Executive Magistrate under Section 133 of the Code of Criminal Procedure against the Appellant. It was alleged in the complaint that one banyan tree, one moye tree and one bhendi tree was likely to fall on the Chapel. The Executive Magistrate, therefore, initiated proceedings against the Appellant bearing No. MAG/133 Cr.P.C. 3/2000. According to the Appellant, the Accused entered his property on 28-6-2000 at about 9.30 a.m. in the morning and cut the trees and took away the wood and, therefore, committed an offence punishable under Sections 427, 447, 379 r/w Section 34 of the Indian Penal Code.

3. According to the Complainant, he immediately filed a complaint against the Accused in the Pernem Police Station. He also wrote a letter to the

Range Forest Officer and made a complaint against the Accused. According to him, the Police did not take any action on his complaint. He thereafter wrote a letter to the Forest Department asking them whether they had cut the trees. The Officers of the Forest Department thereafter came and drew a panchanama and thereafter a private complaint was filed in the Court of the Judicial Magistrate, First Class at Pernem. Thereafter, charge was framed against the Accused who pleaded not guilty to the said charge. The Complainant examined himself and his brother Salvador Britto as P.W.2. He also examined Deepak Pednekar who was the Range Forest Officer at the relevant time as P.W.3 and lastly, he examined the Assistant Sub Inspector Marcel Pinto as P.W.4. The trial Court, however, did not accept the evidence adduced by the Complainant and acquitted the Accused. The Complainant being aggrieved by the said Order of acquittal has preferred this Appeal against acquittal against the Respondents.

4. It is submitted by the learned Counsel appearing on behalf of the Appellant that the trial Court had not apprehended the evidence which was adduced by him in its proper perspective and had ignored the evidence of P.W.2, Salvador Britto, who had witnessed the said incident merely by making an observation that P.W.2, Salvador Britto was the cousin brother of P.W.1, Edultacao Britto and, therefore, was an interested witness. The learned Counsel submitted that the trial Court had committed a manifest error in ignoring the testimony of the eye witness. In support of the said submission, the learned Counsel relied on a Judgment of the Supreme Court in the case of **State of Punjab v. Karnail Singh** reported in ((2003) 11 SCC 271). He also relied on a Judgment of the Supreme Court in the case of **Gajanan Amrut Gaykwad and**

others v. State of Maharashtra reported in (1995 Supp (3) SCC 607). He also relied on a Judgment of the Supreme Court in the case of **Narendra Nath Khaware v. Parasnath Khaware and others** reported in ((2003) 5 SCC 488). He also relied on a Judgment of the Supreme Court in the case of **State of U.P. v. Battan and others** reported in ((2001) 10 SCC 607). He further relied on the Judgment of the Supreme Court in the case of **Aher Maya Visa and others v. State of Gujarat** reported in (1993 Supp (1) SCC 348). He further submitted that the trial Court had erred in coming to the conclusion that the Complainant had not proved the case of criminal trespass against the Respondents. He submitted that the trial Court had clearly ignored the fact that the Complainant had proved that the property was owned by the Complainant and he had produced documentary evidence to that effect. He further submitted that the Accused had not denied by making any suggestions in the cross-examination that the Complainant was not the owner of the property on which the trees were situated. He submitted that the Complainant had specifically stated in his evidence that the Accused had entered his property and had cut the trees of the said property which fact was corroborated by the brother of the Complainant, namely, P.W.2, Salvador Britto. He further submitted that the trial Court had erred in coming to the conclusion that since an independent witness was not examined the testimony of the Complainant and his brother could not be relied upon as they were interested witnesses. He further submitted that the trial Court had erred in coming to the conclusion that the Complainant had not stated in the complaint about the mischief and loss caused to him. The learned Counsel further stated that a specific case was made out by the Complainant in his complaint and, therefore, the said observation made by the trial Court was

unwarranted. The learned Counsel thereafter submitted that the trial Court had erred in giving a finding that the trees were cut down without intention of dishonestly taking the trees out of the possession of the Complainant.

5. The learned Counsel appearing on behalf of the Respondents submitted that the Accused were all above 60 years of age and it was humanely impossible even otherwise for an abled bodied person to cut down three trees in a couple of hours. He submitted that the evidence of the Complainant and his brother P.W.2, Salvador Britto, was absolutely vague regarding the actual incident of cutting of trees and except a bare statement that they had seen the Accused cutting the trees no particulars have been mentioned in their evidence. He further submitted that no independent witness from the locality was examined to corroborate their statement. Further, the statements of P.W.1, Edultacao Britto and P.W.2, Salvador Britto also could not be relied upon as their conduct after they saw the Accused cutting the trees itself was not natural. He further submitted that P.W.1, Edultacao Britto and P.W.2, Salvador Britto apart from being independent witnesses were also on enemical terms with the Accused as a complaint was lodged by the Accused against the Complainant under Section 133 of the Code of Criminal Procedure. He submitted that, therefore, the trial Court was justified in not accepting the testimony of P.W.2, Salvador Britto and P.W.1, Edultacao Britto. He further submitted that even in the complaint no particulars have been mentioned about the actual act of cutting the trees and a solitary statement is made that on 28-6-2000 at 9 a.m., the Accused started cutting the trees. He submitted that the trial Court had

given adequate reasons in support of its findings and, therefore, this Court may not interfere with the Order of acquittal passed by the trial Court.

6. In the present case, the Complainant has examined 4 witnesses out of which 2 witnesses are alleged to be eye witnesses to the said incident. P.W.1, Edultacao Britto, the Complainant has stated in his evidence that the Accused had initiated proceedings under Section 133 of the Code of Criminal Procedure before the Executive Magistrate and had complained that one banyan tree, one moye tree, and one bhendi tree was likely to fall on the Chapel. He has stated that he came to know about the proceedings after he received a notice from the Mamlatdar. Thereafter, he has stated as under:-

"While the pendency of the said proceedings before the Mamlatdar the Accused cut the said trees, and I sustained a loss of about 40,000/-. After cutting the trees the Accused took away the said trees".

7. He has thereafter stated that the day on which the tree was cut was a Wednesday and the Accused had criminally trespassed into his property for the purpose of cutting his trees. He has further stated that when the trees were cut, he was in his house along with his brother P.W.2, Salvador Britto. From this evidence, it can be seen that neither the date nor the time when the said alleged offence had taken place was mentioned by him in his evidence. A solitary statement is made accusing the Respondent that they had cut the said trees. Thus, no particulars are mentioned as to which Accused was cutting

which particular tree or how long the witness watched the Accused cutting the trees. The instruments with which they were cutting the trees also is not mentioned. Further, in his evidence, he has stated that he filed an application before the Range Forest Officer asking him to inform him as to whether the Forest Department had cut the trees from the suit plot. From this letter, it can be seen that the Complainant himself was not very sure as to who had cut the said trees and there was no occasion for him to write a letter to the Range Forest Officer asking him whether the Forest Department had cut the trees. It is no doubt true that in the said letter, it is stated that the Accused had cut the trees. However, no particulars are given in this letter dated 30-1-2001 as to when and in what manner the trees were cut by the Accused. Similarly, in a letter which was addressed to the Range Forest Officer on 28-6-2000 an allegation is made that the Accused had cut the trees on 28-6-2000. However, no particulars have been given in the said complaint. He has further admitted in his examination-in-chief that on 7-7-2000 the Accused had made an application before the Mamlatdar that the proceedings under Section 133 of the Code of Criminal Procedure which was filed against him be dropped as the Forest Department had already cut the trees. The Complainant had again sent a reminder to the Range Forest Officer dated 12-3-2001 requesting him to furnish information whether the Forest Department had cut the trees from his property. From all this correspondence and the evidence of P.W.1, Edultacao Britto, in my view, it can be seen that the Complainant was not sure who had cut the trees from his property. Further from the panchanama which is brought on record, it can be seen that all the trees were cut from their roots. It is difficult to imagine that the Accused could have cut the trees in a couple of

hours. The Accused No.1, Jose D'Souza, was 63 years of age. Accused No.2, Baptist Barreto was 70 years of age and Accused No.3, Sebastian D'Souza, was 68 years of age at the time when the said incident had taken place. It is improbable that the three Accused could have cut 3 trees in one day. The only inference, therefore, which can be drawn from the sketchy and vague account given by P.W.1, Edultacao Britto and P.W.2, Salvador Britto, who also in his evidence has made a solitary statement that he had witnessed the Accused cutting the trees, is that both P.W.1, Edultacao Britto and P.W.2, Salvador Britto have not seen the Accused cutting the trees. It is, therefore, difficult to rely on the testimony of P.W.1, Edultacao Britto and P.W.2, Salvador Britto. Further, there is an inherent contradiction in the statement of P.W.1, Edultacao Britto and in the complaint which has been filed by him. In the complaint, P.W.1, Edultacao Britto, has stated that 3 trees were cut by the Accused. However, in his evidence, he has stated that the Accused cut 4 trees. Further from the evidence of these 2 witnesses it can be seen that their entire testimony cannot be relied upon because they have stated that after the trees were cut the Accused took away the wood. This is highly improbable. Further, P.W.2, Salvador Britto, in his examination-in-chief has stated that the Accused after cutting the trees took away the same whereas in his cross-examination he has stated that on 29-6-2000 the Accused without the help of labourers started taking away the pieces of cut trees one by one.

8. It is no doubt true that the trial Court has completely ignored the evidence of P.W.2, Salvador Britto by stating that he was an interested witness. In my view, the trial Court should have considered the evidence of

P.W.2, Salvador Britto and thereafter should have given a finding as to why his evidence cannot be relied upon. There cannot be any dispute regarding the ratio of the Judgments on which reliance is placed by the learned Counsel appearing on behalf of the Appellant. However, the ratio in the said Judgments in my view, will not be applicable to the facts of the present case.

9. The Complainant has further examined the Range Forest Officer, Deepak Pednekar, P.W.3. P.W.3, Deepak Pednekar, in his evidence has admitted that the Complainant had filed a complaint in the Forest Department dated 28-6-2000. He also admitted that he had received a letter which was sent by the Complainant. It is further admitted that he had given a reply to the said letter. He has further stated in his evidence that pursuant to the complaint filed by the Complainant an offence was registered for illegal cutting of 3 trees and the case was pending for inquiry before the Round Forester, Pernem. He has admitted in his examination-in-chief that the banyan tree which had been cut was dangerous to the Chapel and one log of 3.5 metres in length was seized from the place. The evidence of P.W.3, Deepak Pednekar, is of no assistance to the Complainant as he has not stated that in the inquiry which was made for the illegal cutting of trees. He had received evidence that the Accused were responsible for the cutting of the trees. Finally, the Complainant examined P.W.4, Marcel Pinto, who had

registered the N.C. Complaint which was lodged by the Complainant. The evidence of this witness also is not of any assistance to the Complainant in proving his case.

10. From the evidence on record, in my view, it is difficult to draw any inference that the Accused had cut the trees from the property of the Complainant on 28-6-2000 and I find that the evidence of P.W.1, Edultacao Britto and P.W.2, Salvador Britto is unreliable and no particulars have been given by both these witnesses. Further in my view, the trial Court was right in coming to the conclusion that no independent witness was examined by the prosecution in support of his case.

11. Further, it appears to be improbable that the Accused who were in their late 60's could have themselves cut the trees in one day. Thus, the possibility of the Complainant taking the name of the Accused on suspicion cannot be ruled out. P.W.3, Marcel Pinto, in his evidence has admitted that one of the tree was likely to cause damage to the Chapel. Under these circumstances, there is every possibility that the tree may have been cut either by the Forest Officers or by the villagers. The Accused had withdrawn the complaint which they had filed under Section 133 of the Code of Criminal Procedure before the Executive Magistrate by stating that the trees which were causing danger to the Santa Cruz Chapel had been cut by the Forest Officers and, therefore, had withdrawn the complaint under Section 133 of the Code of Criminal Procedure. Thus, the case of the Complainant of mischief under

Section 447 criminal trespass and theft has not been proved beyond reasonable doubt. The finding of the trial Court is, therefore confirmed. The Appeal against acquittal is, therefore, dismissed.

V. M. KANADE, J.

RD.